



Anthony D. Hogan appeals his convictions of criminal deviate conduct resulting in serious bodily injury as a Class A felony,<sup>1</sup> attempted rape as a Class B felony,<sup>2</sup> and battery resulting in serious bodily injury as a Class C felony,<sup>3</sup> and the finding he is an habitual offender.<sup>4</sup> Hogan stipulated to being an habitual offender and is estopped from challenging his own stipulation. Although the verdict form referred to “criminal deviate conduct” rather than “criminal deviate conduct resulting in serious bodily injury,” the jury instructions as a whole clearly indicated serious bodily injury was required to convict Hogan of criminal deviate conduct as charged. Because Hogan’s conviction of battery resulting in serious bodily injury was based on the same evidentiary facts used to convict him of criminal deviate conduct resulting in serious bodily injury, we vacate his conviction of battery. The evidence was sufficient to sustain Hogan’s conviction of attempted rape.

We affirm in part and reverse in part.

### **FACTS AND PROCEDURAL HISTORY**

On a few occasions in the summer and early fall of 2004, Hogan used illegal drugs with Mike Oelslager and his girlfriend, Tracy Kling. On October 5, 2004, Hogan came to the house Kling and Oelslager shared. Oelslager was not home at the time but Kling let Hogan in.

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<sup>1</sup> Ind. Code § 35-42-4-2.

<sup>2</sup> Ind. Code § 35-42-4-1; Ind. Code § 35-41-5-1.

<sup>3</sup> Ind. Code § 35-42-2-1.

<sup>4</sup> Ind. Code § 35-50-2-8(a).

After the two talked for a few minutes, Hogan asked Kling if she wanted to have sex with him. She declined. Hogan grabbed her from behind, pinned one of her arms, picked her up, and carried her to her son's bedroom.<sup>5</sup> He told her he was going to have sex with her. To dissuade Hogan, Kling told him she was on her period and he stated he would have anal sex with her instead. He held Kling down and attempted to remove her underwear. She struggled against him, and he threatened to kill her.

Kling convinced him not to have sex with her in her son's bedroom. Hogan pushed her out of the bedroom and onto the couch in the living room. He again attempted to remove her underwear. When Kling again stated she was on her period, Hogan told her to perform oral sex on him. He choked her and again threatened to kill her.

Kling broke free and jumped over a banister.<sup>6</sup> Before she could get out the front door, Hogan caught her and slammed the door shut. He punched her twice in the head, hitting her eye, nose, and forehead, and causing her to bleed. He again threatened to kill her. Hogan used a shirt to wipe the blood from her face. He then took her back to the couch and forced her to perform oral sex on him. He left shortly afterward, taking the shirt with him.

Kling went to a neighbor's house to call the police. After talking with police, Kling went to the hospital. She received stitches in her forehead, an injection for pain, and a prescription for pain medication.

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<sup>5</sup> Kling's children were not home at the time.

<sup>6</sup> Kling sprained her ankle and injured her back when she landed.

The State charged Hogan with criminal deviate conduct resulting in serious bodily injury, attempted rape, and battery resulting in serious bodily injury. An habitual offender enhancement was added. During the initial phase of the trial, a jury found Hogan guilty of criminal deviate conduct, attempted rape, and battery.

Outside the presence of the jury and before the habitual offender phase of the trial began, Hogan agreed to “stipulate to a status as a [sic] habitual offender upon the appropriate questions put to him by the State.” (Tr. at 418.) In exchange, the State withdrew its “intention to have the jury find aggravating circumstances.” (*Id.*) Hogan admitted felony convictions in 1980 and in 1987.

At the sentencing hearing on April 17, 2006, Hogan requested copies of the verdict forms. He then argued his conviction of criminal deviate conduct resulting in serious bodily injury should be set aside because the verdict form did not refer to serious bodily injury, but only to criminal deviate conduct. The sentencing hearing was continued until April 25, 2006, when the trial court denied Hogan’s request.

The trial court sentenced Hogan to thirty years for criminal deviate conduct with serious bodily injury. The habitual offender enhancement was attached to the criminal deviate conduct charge, and the trial court enhanced Hogan’s sentence by thirty years. It sentenced Hogan to twenty years for attempted rape and eight years for battery with serious bodily injury. All sentences were to be served concurrently for an aggregate sixty-year sentence.

## DISCUSSION AND DECISION

Hogan argues the evidence was insufficient to support the finding he was an habitual offender, the verdict forms for the criminal deviate conduct charge were incorrect, his convictions were based on the same factual allegations and therefore subjected him to double jeopardy, and the evidence was insufficient to support his conviction of attempted rape.

### 1. Habitual Offender

The State separately alleged Hogan was an habitual offender. With respect to Hogan's prior unrelated felony convictions, the State alleged:

On or about the 7th day of December, 1979 in the County of St. Joseph, State of Indiana, one ANTHONY D. HOGAN committed the felony offense of RAPE and was convicted of said offense on the 20th day of November, 1980 in cause number 21584 in St. Joseph Superior Court, City of South Bend, State of Indiana;

On or about the 30th day of March, 1987 in the County of St. Joseph, State of Indiana, one ANTHONY D. HOGAN committed a felony offense of RAPE and was convicted of said offense on the 9th day of September, 1987 in cause number 26354 in the St. Joseph Superior Court, South Bend, State of Indiana.

(App. at 29.) The State subsequently filed a Notice of Aggravating Circumstances, indicating it intended "to prove the existence of such aggravating circumstances to a jury." (*Id.* at 46.)

After the jury announced its guilty verdict in the guilt phase of the trial, Hogan was questioned about his prior convictions. He testified he had been convicted of felonies in 1980 and 1987.

Hogan argues the evidence was insufficient to support his habitual offender enhancement. It was not. Hogan offered to, and did, stipulate to being an “habitual offender upon the appropriate questions put to him by the State.” (Tr. at 418.) Hogan admitted he had two prior unrelated felony convictions. Having invited the State to rely on his stipulation, Hogan may not now take advantage of the State’s decision not to present additional evidence of his prior convictions. *See Wright v. State*, 828 N.E.2d 904, 907 (Ind. 2005) (Under the doctrine of invited error, “a party may not take advantage of an error [he] commits, invites, or which is the natural consequence of [his] own neglect or misconduct.”)

We affirm the finding Hogan was an habitual offender.

## 2. Verdict Forms

Hogan argues his conviction of criminal deviate conduct resulting in serious bodily injury must be set aside because the verdict forms referred to “criminal deviate conduct” rather than “criminal deviate conduct resulting in serious bodily injury.” We disagree.

The verdict forms were not discussed during the final instruction conference,<sup>7</sup> but Final Instruction No. 32A explained the verdict forms to the jurors:

As you retire to deliberate, you will be given six (6) forms of the verdict:

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<sup>7</sup> Defense counsel noted, “I want to state on the record that my best recollection of the last day of trial is that this verdict form was not presented to counsel. I don’t think it was presented to counsel on either side and the opportunity to review the verdict was not presented. That may have solved the issue earlier, but we’re here now and the jury having been discharged it’s a little difficult to kind of put that toothpaste back into the tube.” (April 25, 2006 Sent. Tr. at 4.)

If you find the defendant, Anthony D. Hogan, not guilty of the crime of criminal deviate conduct, then your verdict should read as follows:

VERDICT A

We, the Jury, find the defendant, Anthony D. Hogan, not guilty of the crime of criminal deviate conduct.

If you find the defendant, Anthony D. Hogan, guilty of the crime of criminal deviate conduct, then your verdict should read as follows:

VERDICT B

We, the Jury, find the defendant, Anthony D. Hogan, guilty of the crime of criminal deviate conduct.

(App. at 189.) Hogan did not object to that instruction or to the verdict form when it was read to the jury. The failure to object at trial results in waiver of the issue on appeal. *Bruno v. State*, 774 N.E.2d 880, 883 (Ind. 2002). “We will review an issue that was waived at trial if we find fundamental error.” *Id.* The defendant, however, must prove the error was so prejudicial as to make a fair trial impossible. *Id.*

Final Instruction No. 2 included the charging information and provided, in relevant part:

COUNT I

The undersigned affiant swears that on or about October 5, 2004, at the County of Elkhart and State of Indiana, one Anthony D. Hogan did then and there knowingly or intentionally cause another person to perform or submit to deviate sexual conduct by force or the imminent threat of force, to wit: said Anthony D. Hogan forced Tracy Kling to perform fellatio on Anthony D. Hogan by threatening Kling that she would be killed if she did not comply with his requests *which resulted in serious bodily injury* to Tracy Kling; to-wit: extreme pain, all of which is contrary to the form of the statute in such cases made and provided; and against the peace and dignity of the State of Indiana.

(App. at 153) (emphasis supplied). Instruction No. 6 provided:

The crime of criminal deviate conduct is defined by law as follows:

A person who knowingly or intentionally causes another person to perform or submit to deviate sexual conduct when the other person is

compelled by force or the imminent threat of force, commits deviate sexual conduct.

Before you may convict the Defendant, the State must prove *each of the following* beyond a reasonable doubt:

1. The defendant
2. Knowingly or intentionally
3. Caused Tracy Kling to perform or submit to deviate sexual conduct when
4. Tracy Kling was compelled by force or imminent threat of force
5. And the defendant committed elements 1 through 4 by threatening the use of deadly force
6. And the defendant's commission of elements 1 through 4 *resulted in serious bodily injury* to Tracy Kling.

If the State fails to prove *each of these elements* beyond a reasonable doubt, *you must find the defendant not guilty of criminal deviate conduct*, charged in Count I.

(*Id.* at 159-60) (emphases supplied). None of the remaining instructions concern criminal deviate conduct specifically. However, other instructions emphasized each element of the crime charged must be proven beyond a reasonable doubt in order to find Hogan guilty. The trial court also instructed the jury to consider the instructions as a whole.

We presume the jury follows the instructions it is given. *Tormoehlen v. State*, 848 N.E.2d 326, 332 (Ind. Ct. App. 2006), *trans. denied* 860 N.E.2d 583 (Ind. 2006). The instructions as a whole informed the jury the State must prove every element of the charged crime beyond a reasonable doubt. The instructions consistently included “serious bodily injury” as an element of the crime. They did not misstate the law or otherwise mislead the jury. There is no reason to believe the jury did not consider the

instructions as a whole and apply them appropriately. Accordingly, no fundamental error occurred.<sup>8</sup> See *Bruno*, 774 N.E.2d at 883.

### 3. Double Jeopardy

Hogan argues his convictions of criminal deviate conduct and battery resulting in serious bodily injury were based on the same factual allegations and thus violated the Double Jeopardy Clause of the Indiana Constitution.<sup>9</sup> We agree and vacate Hogan's conviction of battery resulting in serious bodily injury.

Article I, Section 14 of the Indiana Constitution provides: "No person shall be put in jeopardy twice for the same offense." Our Indiana Supreme Court analyzed the double jeopardy protections afforded under this clause in *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999), and concluded:

[T]wo or more offenses are the "same offense" in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to *either* the statutory elements of the challenged crimes *or* the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense.

*Id.* at 49 (emphases original). Hogan does not argue his convictions violate the statutory elements test.

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<sup>8</sup> Hogan did not request an instruction on the lesser-included offense of criminal deviate conduct as a Class B felony, an offense that does not require proof of serious bodily injury. As the trial court noted, "the only criminal deviate conduct that this jury was ever made aware of is the one containing elements that make it an A felony[.]" (April 25, 2006 Sent. Tr. at 7.) Therefore, the verdict forms could not have misled the jury into believing serious bodily injury was not required.

<sup>9</sup> Hogan also asserts, without a supporting argument, the "crime of Attempted Rape was also based on the same factual scenario." (Br. of Defendant-Appellant at 29.) Failure to present argument on an issue constitutes waiver of the issue for appellate review. *Hollowell v. State*, 707 N.E.2d 1014, 1025 (Ind. Ct. App. 1999). Consequently, we conclude Hogan has waived the issue of whether his conviction of attempted rape also violated Indiana's Double Jeopardy Clause. Waiver notwithstanding, our related analysis in Section 4, *infra*, demonstrates Hogan's claim must fail under the actual evidence test described herein.

Under the actual evidence test, “the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts.” *Id.* at 53. To succeed under this test, Hogan must demonstrate “a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.” *Id.* To determine whether the same facts were used, we consider the evidence, charging information, final jury instructions, and arguments of counsel. *Goldsberry v. State*, 821 N.E.2d 447, 459 (Ind. Ct. App. 2005).

Hogan asserts there “was only one struggle which resulted in the injuries to Tracy Kling.” (Br. of Defendant-Appellant at 25.) He summarizes the “one struggle” as follows: “Kling testified that during her struggle with Hogan she was held down; picked up; choked; had her hands and arms restrained; threatened to be killed; forced into providing oral sex; and punched twice in the forehead.” (*Id.* at 25-26.) He argues the State “enhanced” his criminal deviate conduct charge to a Class A felony, alleged attempted rape, and “elevated” the battery charge from a misdemeanor to a felony “[b]ased on the same set of injuries.” (*Id.* at 25.)

The charging information and final instructions for criminal deviate conduct and for battery characterize the “serious bodily injury” as “extreme pain.” (*E.g.*, App. at 16.) Kling reported pain in her ankle and back from jumping over the banister, in her neck and throat from being choked, and in her head, eye, and nose from being punched in the face. In closing arguments, the State described various acts that could have caused Kling extreme pain. With respect to criminal deviate conduct, the State referred to Kling being

“struck twice in the face” and acquiescing to Hogan’s demand for oral sex as a result of being thus hit. (Tr. at 384.) Concerning the battery count, the State referred both to the “blows to the face” and to the “choke marks” on Kling’s neck. (*Id.* at 386.)

We conclude there was a reasonable possibility the jury used evidence of the same pain from the same act—Hogan hitting Kling in the face—to establish the essential element of serious bodily injury for both the criminal deviate conduct and battery charges.

“When two convictions are found to contravene the double jeopardy principles, a reviewing court may remedy the violation by reducing either conviction to a less serious form of the same offense if doing so will eliminate the violation. If it will not, one of the convictions must be vacated.” *Richardson*, 717 N.E.2d at 54 (internal citations omitted). In doing so, we must be “mindful of the penal consequences that the trial court found appropriate.” *Id.*

Hogan asserts reducing his conviction of criminal deviate conduct from a Class A felony to a Class B felony is an appropriate remedy. The State argues we should vacate Hogan’s battery conviction instead: “The State supported the touching for the battery conviction with the same touchings that established the force or threat of force for the criminal deviate conduct conviction. Criminal deviate conduct as a Class B felony still would require evidence of force or threat of force.” (Br. of Appellee at 13) (citations omitted).

We agree with the State. Hogan’s act of hitting Kling in the face could be used both as evidence of force for criminal deviate conduct as a Class B felony and as

evidence of extreme pain for battery resulting in serious bodily injury. Accordingly, Hogan's conviction of battery resulting in serious bodily injury must be vacated.

4. Sufficiency of Evidence

In reviewing sufficiency of the evidence, we will affirm a conviction if, considering only the probative evidence and reasonable inferences supporting the verdict and without weighing evidence or assessing witness credibility, a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. *Hawkins v. State*, 794 N.E.2d 1158, 1164 (Ind. Ct. App. 2003).

A person “who knowingly or intentionally has sexual intercourse with a member of the opposite sex when . . . the other person is compelled by force or imminent threat of force . . . commits rape.” Ind. Code § 35-42-4-1(a). “A person attempts to commit a crime when, acting with the culpability required for commission of the crime, he engages in conduct that constitutes a substantial step toward commission of the crime.” Ind. Code § 35-41-5-1(a). The substantial step alleged in the charging information was “physically overpowering” Kling. (App. at 16.)

Hogan asserts his conviction of attempted rape must be vacated because the evidence “did not establish a separate physical act ‘of overpowering’ which was not incorporated in the physical acts” used to prove the other offenses charged. (Br. of Defendant-Appellant at 32.) We disagree.

Kling testified Hogan grabbed her in the kitchen, forced her to a bedroom, and pushed her onto the bed. He held her down on the bed and told her he was “going to f\*\*\* [her].” (Tr. at 225.) After Kling told him she was on her period, Hogan said he “would

f\*\*\* [her] in the ass.” (*Id.* at 226.) He tried to remove her underwear and threatened to kill her when she struggled.

Hogan “physically overpower[ed]” Kling when he grabbed her, forced her to the bedroom, pushed her onto the bed, and held her down. Hogan then told Kling he intended to have sex with her and attempted to remove her underwear. When she struggled, he threatened to kill her. The jury could reasonably conclude these actions amounted to a substantial step toward rape. The evidence was sufficient to convict Hogan of attempted rape.

### **CONCLUSION**

Because Hogan stipulated to being an habitual offender, he is estopped from challenging the sufficiency of the evidence supporting his habitual offender enhancement. Although the verdict forms for criminal deviate conduct did not include the phrase “resulting in serious bodily injury,” the instructions consistently indicated serious bodily injury was an element of the crime as charged. Because of the content of the State’s final argument, there is a reasonable possibility the jury relied on the same evidence to convict Hogan of criminal deviate conduct resulting in serious bodily injury and battery resulting in serious bodily injury. As a result, we must vacate his battery conviction. The evidence was sufficient to convict Hogan of attempted rape.

Affirmed in part and reversed in part.

NAJAM, J., and MATHIAS, J., concur.